Nov 19. 78. Argd A. H. Swan

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 858.

THE COUNTY COURT OF MACON COUNTY,
PLAINTIFF IN ERROR,

vs.

ALFRED HUIDEKOPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED OCTOBER 12, 1878.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States in and for the western district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the April term, 1878, thereof, between Alfred Huidekoper, relator, and the County Court of Macon county, Missouri, respondents, a manifest error hath happened, to the great damage of the said respondents, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

Issued at office in the city of Jefferson with the seal of the circuit court of the United States for the western district of Missouri, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court United States,
Western District of Missouri.

Allowed by:
ARNOLD KREKEL,
Judge.

2 *Return to Writ.*

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at the city of Jefferson, [SEAL.] this 23rd day of September, A. D. 1878.

H. C. GEISBERG,
Clerk.

Endorsed No. 1094. United States circuit court, western district of Missouri. Alfred Huidekoper, relator, *vs.* Macon County Court. Writ of error to the circuit court of the United States for the west. dist. of Missouri. Returned and filed —— day of ———, 187 .

———— ————,
Clerk.

3 THE UNITED STATES OF AMERICA,

To Alfred Huidekoper, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Missouri, wherein the county court of Macon county, respondents, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arnold Krekel, judge of the circuit court of the United States for the western district of Missouri, this sixth day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

ARNOLD KREKEL,
Judge.

4 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I hereby acknowledge due service of the within citation, this 6th day of May, A. D. 1878.

JOSEPH SHIPPEN,
Attorney for Defendant in Error.

Endorsed 1094. United States circuit court, western district of Missouri. Alfred Huidekoper, relator, *vs.* Mason County Court. Citation. Filed ———, 187 .

———— ————,
Clerk.

5 UNITED STATES OF AMERICA,
Western District of Missouri, set.:

In the circuit court of the United States in and for said district.

Pleas before the honorable circuit court of the United States for said district at the April term, A. D. 1878, in a certain cause wherein Alfred Huidekoper, relator, is plaintiff, and The County Court of Macon county is defendant.

Be it remembered that heretofore, to wit: at a regular stated term of the said circuit court of the United States in and for the western district of Missouri, begun and held at the City of Jefferson, in said district, on the third Monday, being the 15th day of April, A. D. 1878, the following proceedings were had in this case on said day, to wit:

Information for Mandamus filed.

ALFRED HUIDEKOPER, Relator,
vs.
MACON COUNTY COURT. } 1094.

This day comes the relator, by Joseph Shippen, Esq., his attorney, and files herein an information for a writ of mandamus against the said respondents, and said information is there-
6 upon submitted to the court and taken under advisement; which information for a writ of mandamus so filed as aforesaid is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri.

Information for Mandamus.

THE UNITED STATES on the relation of
ALFRED HUIDEKOPER,
vs.
THE COUNTY COURT OF MACON COUNTY
and the Justices thereof. } Information for a writ of mandamus.

To the Judges of the U. S. circuit court for the western district of Missouri:

Now comes Alfred Huidekoper, and gives this court to be informed that he is a citizen of the State of Pennsylvania, and that the county of Macon is a corporation created by and a citizen of the State of Missouri.

That on the 25th day of November, 1874, the said Alfred Huidekoper recovered by the judgment and consideration of this court, of the said county of Macon, the sum of $6,656.79, of which

sum there remained due and unpaid on the 8th day of January, 1878, $6,642.70, with interest at the rate of seven per cent.
7 per annum; that said judgment was recovered on coupons for interest on sundry bonds issued by said county under and by virtue of an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865; by the 13th section whereof said county court was authorized and empowered to levy a special tax of one-twentieth of one per cent. upon the assessed value of the taxable property of said county for each year to pay the same, which one-twentieth of one per cent. is totally inadequate to pay the interest upon the bonds so issued by said county, and the judgments heretofore recovered against it for such interest and the said judgment of your petitioner remaining unpaid.

That by the laws of Missouri the county court of said county has power, and it is their duty, to audit, adjust, and settle all accounts to which the county shall be a party, and to order the payment out of the county treasury of any sum of money due by the county, and upon ascertaining any sum of money to be due from the county they should order their clerk to issue a
8 warrant therefor, to be paid with other warrants in the order of presentation to the treasurer.

That a demand has been made on said county court to order the payment out of the county treasury of Macon county of the amount of his said judgment, and to order their clerk to issue and deliver to him a warrant therefor, which said demand has been refused.

That your petitioner is without any other adequate remedy at law, and he prays for a writ of mandamus from this court, to be directed to the county court of Macon county and the justices thereof, commanding them to direct their clerk to draw a warrant on the county treasurer of Macon county for the amount of said judgment, with interest and costs hereof, payable out of the general funds of the county that are now or may hereafter be in said treasury.

ALFRED HUIDEKOPER,
By JOSEPH SHIPPEN,
His Attorney.

I, Joseph Shippen, being duly sworn, depose and say that I am the attorney for Alfred Huidekoper; that I have read the foregoing petition, and that I know the facts therein stated are true.

JOSEPH SHIPPEN.

9 Sworn and subscribed to this 15th day of April, 1878.

WARREN WATSON,
Com'r U. S. Cir. Ct. West. Dist. Mo.

And afterwards, at said last-mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 16th day of April, A. D. 1878, to wit:

Alternative Writ Ordered.

ALFRED HUIDEKOPER, Relator,
vs. } 1094.
MACON COUNTY COURT.

The information in the above cause having been heretofore submitted to the court, and the premises being duly considered, it is now ordered that a writ of mandamus in the alternative issue in the above cause against the respondents, commanding them to direct their clerk to draw a warrant on the county treasurer of Macon county for the amount of the judgment in the information described, with interest and costs, payable out of the general funds of the county that are now or may hereafter be in said treasury, returnable to the first Monday in May next.

And afterwards, on the 23d day of April, A. D. 1878, there was issued out of said clerk's office the following writ of mandamus:

10 *Alternative Mandamus.*

WESTERN DISTRICT OF MISSOURI, *sct.:*

The President of the United States of America to the marshal of the western district of Missouri, greeting:

Whereas it has been represented to our circuit court of the United States in and for the western district of Missouri, that Alfred Huidekoper is a citizen of the State of Pennsylvania, and that the County of Macon is a municipal corporation created by and a citizen of the State of Missouri, whose financial affairs are managed by a county court, composed of justices who are citizens of said State of Missouri; that on the 25th day of November, A. D. 1874, the said Alfred Huidekoper recovered, by the judgment and consideration of our said court of the said county of Macon, the sum of six thousand six hundred and fifty-six dollars and seventy-nine cents, of which sum there remained due and unpaid on the 8th day of January, 1878, six thousand six hundred and forty-two dollars and seventy cents, with interest at the rate of seven per cent. per annum; that said judgment was recovered on coupons for interest on sundry bonds issued by said county under and by virtue of an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865,

by the 13th section thereof said county court was author-
11 ized and empowered to levy a special tax of one-twentieth of one per cent. upon the assessed value of the taxable property of said county for each year to pay the same, which one-twentieth of one per cent. is totally inadequate to pay the interest upon the bonds so issued by said county, and the judgments heretofore recovered against it for such interest, and the said judgment of your petitioner remaining unpaid; that by the laws of Missouri the county court of said county has power, and it is their duty to audit, adjust, and settle all accounts to which the county shall be a party, and to order the payment out of the county treasury of any sum of money due by the county, and upon ascertaining any sum of money to be due from the county they should order their clerk to issue a warrant therefor, to be paid with other warrants, in the order of presentation to the treasurer: that a demand has been made on said county court to order the payment out of the county treasury of Macon county of the amount of his said judgment, and to order their clerk to issue and deliver to him a warrant therefor, which said demand has been refused; that the relator has no other adequate remedy at law.

Wherefore you, the said county court of Macon county and the justices thereof, are hereby commanded to forthwith direct your clerk to draw a warrant on the county treasury of Macon
12 county for the amount of said judgment, with interest and costs hereof, payable out of the general funds of the county that are now or may hereafter be in said treasury, or show cause before our said court, on the first Monday of May next, why you refuse so to do.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, issued at office in [SEAL.] Jefferson City, in said district, this 23d day of April, A. D. 1878, under the seal of the said circuit court.

H. C. GEISBERG,
Clerk.

Upon said writ is the following marshal's return:

Marshal's Return.

I hereby certify that I executed the writ of which this is a duplicate by leaving the same with John P. Walker, Lee Lings, and Geo. L. Towner in person, members of the county court of Macon county, and further, by leaving the writ, of which this is a duplicate, with James M. Love, clerk of the county court of Macon county, in person, in the office of said clerk of said co.

All done in the county of Macon, in the western dist. of Mo., this 27th day of April, A. D. 1878.

C. C. ALLEN,
Marshal West. Dist. Mo.
By C. C. CRIPPEN,
Deputy.

And afterwards, at the regular stated term of said circuit court, begun and held on the third Monday of April, A. D. 1878,
13 and on the 6th day of May, A. D. 1878, it being an adjourned day of said term, the following further proceedings were had in this case, to wit:

A. HUIDEKOPER, Relator,
vs. } 1094.
MACON COUNTY COURT.

Return to Alternative Writ and Demurrer thereto filed.

This day come the respondents, by their attorney, W. P. Hall, Esq., and file return to the alternative writ; thereupon comes the relator, by Joseph Shippen, Esq., and files demurrer to return, and the same being submitted to the court, it is ordered that said demurrer be sustained; and the respondents electing to abide by their said return, and refusing to make any further or additional return, it is ordered that a peremptory mandamus issue against the respondents, commanding them to forthwith draw a warrant on the treasurer of Macon county for the amount of the judgment described in the information, to wit, the sum of six thousand six hundred and forty-two dollars and seventy cents, with interest at seven per cent. from the 8th day of January, A. D. 1878, with costs accrued and accruing thereon, payable out of the general funds of the county that are now or may here-
14 after be in said treasury; said writ to be returnable to the next term of this court.

Demurrer sustained. Peremptory writ ordered.

Writ of Error allowed—Citation signed.

Thereupon come the said respondents, by their said attorney, and present to the court a writ of error to reverse the above order and judgment, and a citation to the relator: and said writ is thereupon allowed and said citation signed.

Which return to alternative mandamus, so filed as aforesaid, is in words and figures following, to wit:

by the 13th section thereof said county court was authorized and empowered to levy a special tax of one-twentieth
11 of one per cent. upon the assessed value of the taxable property of said county for each year to pay the same, which one-twentieth of one per cent. is totally inadequate to pay the interest upon the bonds so issued by said county, and the judgments heretofore recovered against it for such interest, and the said judgment of your petitioner remaining unpaid; that by the laws of Missouri the county court of said county has power, and it is their duty to audit, adjust, and settle all accounts to which the county shall be a party, and to order the payment out of the county treasury of any sum of money due by the county, and upon ascertaining any sum of money to be due from the county they should order their clerk to issue a warrant therefor, to be paid with other warrants, in the order of presentation to the treasurer: that a demand has been made on said county court to order the payment out of the county treasury of Macon county of the amount of his said judgment, and to order their clerk to issue and deliver to him a warrant therefor, which said demand has been refused: that the relator has no other adequate remedy at law.

Wherefore you, the said county court of Macon county and the justices thereof, are hereby commanded to forthwith direct your clerk to draw a warrant on the county treasury of Macon
12 county for the amount of said judgment, with interest and costs hereof, payable out of the general funds of the county that are now or may hereafter be in said treasury, or show cause before our said court, on the first Monday of May next, why you refuse so to do.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, issued at office in [SEAL.] Jefferson City, in said district, this 23d day of April, A. D. 1878, under the seal of the said circuit court.

H. C. GEISBERG,
Clerk.

Upon said writ is the following marshal's return:

Marshal's Return.

I hereby certify that I executed the writ of which this is a duplicate by leaving the same with John P. Walker, Lee Lings, and Geo. L. Towner in person, members of the county court of Macon county, and further, by leaving the writ, of which this is a duplicate, with James M. Love, clerk of the county court of Macon county, in person, in the office of said clerk of said co.

All done in the county of Macon, in the western dist. of Mo., this 27th day of April, A. D. 1878.

C. C. ALLEN,
Marshal West. Dist. Mo.
By C. C. CRIPPEN,
Deputy.

And afterwards, at the regular stated term of said circuit court, begun and held on the third Monday of April, A. D. 1878,
13 and on the 6th day of May, A. D. 1878, it being an adjourned day of said term, the following further proceedings were had in this case, to wit:

A. HUIDEKOPER, Relator,
vs. } 1094.
MACON COUNTY COURT.

Return to Alternative Writ and Demurrer thereto filed.

This day come the respondents, by their attorney, W. P. Hall, Esq., and file return to the alternative writ; thereupon comes the relator, by Joseph Shippen, Esq., and files demurrer to return, and the same being submitted to the court, it is ordered that said demurrer be sustained; and the respondents electing to abide by their said return, and refusing to make any further or additional return, it is ordered that a peremptory mandamus issue against the respondents, commanding them to forthwith draw a warrant on the treasurer of Macon county for the amount of the judgment described in the information, to wit, the sum of six thousand six hundred and forty-two dollars and seventy cents, with interest at seven per cent. from the 8th day of January, A. D. 1878, with costs accrued and accruing thereon, payable out of the general funds of the county that are now or may hereafter be in said treasury; said writ to be returnable to the next term of this court.

Demurrer sustained. Peremptory writ ordered.

14

Writ of Error allowed—Citation signed.

Thereupon come the said respondents, by their said attorney, and present to the court a writ of error to reverse the above order and judgment, and a citation to the relator: and said writ is thereupon allowed and said citation signed.

Which return to alternative mandamus, so filed as aforesaid, is in words and figures following, to wit:

Return to Alternative Mandamus.

In the circuit court of the United States for the western district of Missouri, April term, A. D. 1878.

THE UNITED STATES *ex rel.* ALFRED HUIDEKOPER, Relator, *vs.* THE COUNTY COURT OF MACON COUNTY and the Justices thereof, Respondents.	Return to writ of mandamus.

Now at this day come the respondents, and for return to the alternative writ of mandamus issued in the above cause, or so much as they are advised that is material for them to answer, and admit that a judgment was rendered against the county of
15 Macon in favor of the relator, as alleged in said writ of mandamus, which judgement was on coupons for interest on sundry bonds issued by said county under and by virtue of an act to incorporate the Missouri and Mississippi Railroad Company, approved February 20, 1865, and that by the 13th section of said act said county court was authorized and empowered to levy a special tax of $\frac{1}{20}$ of one per cent. upon the assessed value of the taxable property of said county for each year to pay the same: admit that said levy of $\frac{1}{20}$ of one per cent. is inadequate to pay the interest upon the bonds so issued by said county and the judgements heretofore recovered against it for such interest, and the judgement of the relator; admit that said judgment, to the amount of six thousand six hundred and forty-two dollars and seventy cents, with interest at the rate of seven per cent. per annum, is due and unpaid; admit that a demand has been made by relator upon respondents, as the justices of the Macon county court, to order the payment, out of the county treasury of Macon county, the amount of relator's said judgement, and to order their clerk to issue and deliver to him a warrant therefor, which
16 said demand was refused. Respondents admit that they, as the justices of Macon county court, under and by virtue of the laws of the State of Missouri, have power to audit, adjust and settle all unadjusted and unsettled accounts against Macon county, and to which said county is a party, and to order the payment, out of the county treasury, of any sum of money thus found to be due by said county, and to order their clerk to issue a warrant therefor, but respondents aver that each and every warrant which they are authorized by law and by the statutes of the State to order to be drawn by their clerk must express upon its face the particular fund out of which it must be paid by the treasurer of the county, and said treasurer is expressly prohibited by the statutes of the State from paying such warrant out of any fund in the treasury other than the fund mentioned in such warrant.

For further return to said writ respondents state that the county of Macon has no goods, chattels, moneys, lands or other property subject to levy and sale under execution, out of which said judgement, or any part thereof, could be made.

For further return to said writ of mandamus respond-
17 ents state that under and by virtue of an act of the general assembly of the State of Missouri entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865, the corporators therein named organized and accepted the provisions of said act on the —— day of September, 1866, and from that day said corporators became and have been a body corporate and politic under the name of the "Missouri and Mississippi Railroad Company." That the 13th section of said act, conferring said power to subscribe as aforesaid, reads as follows:

"Sec. 13. It shall be lawful for the corporate authorities of any city or town, or county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one twentieth of one per cent. upon the assessed value of the taxable property for each year."

That in and by the authority conferred upon the county court of Macon county in said section, and no other power or authority, said court, on the 2d day of April, 1867, subscribed the sum of one hundred and seventy-five thousand dollars to the capital stock of said railroad company, and issued bonds to it in
18 payment of said subscription; that said subscription was made without the assent of two-thirds of the qualified voters of said Macon county, no election, regular or special, having been held in said county for the purpose of obtaining such assent; but, on the contrary, such subscription was made by said county court against the wishes of a very large majority of the qualified voters of said county.

Respondents further aver that afterwards, to wit: on the 12th day of April, 1870, said county court made a second subscription of one hundred and seventy-five thousand dollars to the capital stock of said railroad company, and issued bonds in payment thereof, (from a portion of which the coupons in this suit were detached;) that said second subscription was made without the consent of two-thirds of the qualified voters of said county, no election, general or special, having been held in said county for the purpose of obtaining said assent; but, on the contrary, said subscription was made by said county court against the wishes of nine-tenths of the qualified voters of said county. That the money realized from both of said subscriptions, and the bonds issued therefor, have all been spent, and no portion of the
19 Missouri and Mississippi railroad has been completed,

except seventeen miles between Salisbury, in Chariton county, and Glasgow, in Howard county; and said portion of said railroad is so far from Macon county that it is no benefit to said county.

That the coupons upon which the relator's judgment was obtained were a part of the coupons taken from bonds issued in payment of the second subscription by Macon county to said Missouri and Mississippi Railroad Company; that ever since the issuing of said bonds in payment of said second subscription said county court of Macon county, under and by virtue of said act of the general assembly, has levied every year a special tax of $\frac{1}{2}_{0}$ of one per cent. upon the assessed value of all the taxable property in said county, and authorized said special tax to be extended upon the tax books of said county for each year, and had said special tax collected for the purpose of paying said bonds and interest, so far as the same would do so; that the tax thus collected is inadequate to pay all the interest on said bonds; that the aggregate valuation of the taxable property in Macon county for the year 1874 was four million eight hundred and fifty-three thousand five hundred and eighty-four dollars and
20 fifty-seven cents; the valuation of the taxable property in said county for the year 1878 is four million nine hundred and sixteen thousand eight hundred and thirty-five dollars.

That the 11th section of the X article of the constitution of the State of Missouri limits the power of county courts in levying taxes for county purposes, as follows:

"For county purposes the annual rate on property in counties having six million dollars or less shall not in the aggregate exceed fifty cents on the one hundred dollars valuation."

That by section 165, chapter 118, of Wagner's Missouri statutes, it is provided as follows:

"The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property and licenses made taxable by law for State purposes, * * but the county tax in no case shall exceed one half of one per cent. on the taxable property."

That these respondents have no authority to levy any other or greater tax for common fund purposes than fifty cents on the one hundred dollars valuation of the taxable property in the county in any one year; that such levy of fifty cents on the one
21 hundred dollars valuation constitute the "common fund" of said county upon which relator seeks to have a warrant drawn to pay his judgment against said county; that by the laws of the State of Missouri the respondents, as justices of the Macon county court, are only authorized by the statutes of said State to order warrants to be drawn on the common fund of said county

by the clerk of said Macon county court on the treasurer of said county as follows, and for no other purposes, viz.: Salaries and fees of all county officers for performing their respective duties imposed upon them by the laws of the State, for the support of the poor of said county; for the support of the county patients in the various asylums of the State; for the building and repairing of bridges, opening public highways, the payment of grand and petit jurors in the county, expenses of witnesses before the grand jury, and serving su[b]pœnas for their attendance thereon; for books and stationery for county officers, and various and many other expenses too numerous to mention. That the payment of said salaries and expenses absorb all the said tax of fifty cents on the one hundred dollars valuation, when prudently and economically applied, so that there is no money left in the
22 county treasury with which to pay a warrant, if drawn in favor of relator on the county treasurer for the amount of his said judgment, interest, and cost.

That if these respondents should draw such warrant it would take money which legitimately and properly is only applicable to the purposes hereinbefore stated, and it would entirely suspend and disorganize the county government of Macon county.

That these respondents, as justices of the Macon county court, have no legal power or authority to levy any other or greater tax than is hereinbefore stated.

That the relator, under the laws of the State of Missouri, is not entitled to any portion of the common fund of said county until all of the fees and expenses necessary to the running and operating of the county government have been first paid. The said fees and expenses absorb all the money arising from said tax of fifty cents on the one hundred dollars' valuation of the property in Macon county annually. That the relator is only entitled to his pro rata part of said special tax of $\frac{1}{2}\frac{1}{0}$ of one per cent. so levied and collected upon the taxable property in said county in
23 each year with all other creditors of said county who have judgements as aforesaid on bonds and coupons thereon, and the interest on other bonds as aforesaid and coupons thereon still outstanding issued to said railroad company, as hereinbefore stated, and is not entitled to a warrant on the common fund, or any other fund of said county except that created by said special levy of $\frac{1}{2}\frac{1}{0}$ of one per cent. That there are judgements which have been rendered upon said bonds and coupons issued as aforesaid against said county aggregating from fifty to sixty thousand dollars, in favor of various parties, rendered in the United States circuit court for the western district of Missouri, and in the circuit court of Macon county, Missouri, which remain unpaid and unsatisfied, and said county has no property or money out of which to pay the same.

Wherefore, these respondents say that the relator is not entitled to have a warrant drawn on the common fund of Macon county upon the treasurer of said county for the amount of his judgment, interest and costs, or any part thereof, and pray the court that the county government may be by it fully protected against
24 the claims of the relator for a warrant as prayed, and that they be discharged with their proper costs.

JAMES W. ROBERTS,
Prosecuting Attorney for Macon County.
JAMES CARR and B. G. BARROW,
Of Counsel.

John P. Walker, Georg[e] L. Towner, and Lee Lingo, justices of the county court of Macon county, Missouri, and respondents to the above and foregoing return, make oath and say that they have heard and understand the foregoing return and the facts therein as stated, and they verily believe that they are true.

Signed G. L. TOWNER.
LEE LINGO.
JOHN T. WALKER.

Subscribed and sworn to before me, a notary public within and for Macon county, Missouri, this May 2d, 1878.

[SEAL.] JAMES W. ROBERTS,
Notary Public,
Commissioned Dec. 11, 1874, *for four years.*

Which demurrer to respondents' return so filed as aforesaid is words and figures following, to wit:

Demurrer to Return.

In the circuit court of the United States for the western district of Missouri.

UNITED STATES *ex rel.* ALFRED HUIDEKOPER }
vs.
25 MACON COUNTY COURT. }

And now comes Alfred Huidekoper, relator, and demurs to the return of the respondents herein, and for ground of demurrer, relator shows that said return does not state facts sufficient to constitute in law any cause why the relator should not have the relief prayed for in his information.

JOSEPH SHIPPEN,
Relator's Attorney.

And afterwards, on the 2d day of July, A. D. 1878, there was issued out of said clerk's office the following peremptory writ of mandamus:

Peremptory Mandamus.

WESTERN DISTRICT OF MISSOURI, *set.:*

The President of the United States of America to the county court of Macon county and the justices thereof, greeting:

Whereas it has been represented to our circuit court of the United States in and for the western district of Missouri that Alfred Huidekoper is a citizen of the State of Pennsylvania, and that the county of Macon is a municipal corporation created by and a citizen of the State of Missouri, whose financial affairs are managed by a county court composed of justices who are citizens of the State of Missouri; that on the 25th day of Novem-
26 ber, A. D. 1874, the said Alfred Huidekoper recovered by the judgment and consideration of our said court of the said county of Macon the sum of six thousand six hundred and fifty-six dollars and seventy-nine cents, of which sum there remained due and unpaid on the 8th day of January, A. D. 1878, six thousand six hundred and forty-two dollars and seventy cents, with interest at the rate of seven per cent. per annum; that said judgment was recovered upon coupons for interest on sundry bonds issued by said county under and by virtue of an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865, by the 13th section whereof said county court was authorized and empowered to levy a special tax of one-twentieth of one per cent. upon the assessed value of the taxable property of said county for each year to pay the same, which one-twentieth of one per cent. is totally inadequate to pay the interest upon the bonds so issued by said county and the judgments heretofore recovered against it for such interest and the said judgment of petitioner remaining unpaid; that by the laws of Mis-
27 souri the county court of said county has power, and it is their duty, to audit, adjust, and settle all accounts to which the county shall be a party, and to order the payment out of the county treasury of any money due by the county, and upon ascertaining any sum of money to be due from the county they should order their clerk to issue a warrant therefor, to be paid with other warrants in the order of presentation to the treasurer; that a demand has been made on said county court to order the payment out of the county treasury of Macon county of the amount of his said judgment, and to order their clerk to issue and deliver to him a warrant therefor, which said demand has been refused; that the relator has no other adequate remedy at law.

Wherefore, you, the said county court of Macon county, and the justices thereof, are hereby commanded to forthwith direct your clerk to draw a warrant on the county treasurer, of Macon county, for the amount of said judgment, with interest and costs hereof, payable out of the general funds of the county that are now, or may hereafter be, in said treasury, and certify due obedience to this writ on the first day of the next term of this Court.

28 Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme of the United States, the 2d day
[SEAL] of July, A. D. 1878. Issued at office in the city of Jefferson, in said district, under the seal of said circuit court, the day and year last aforesaid.

H. C. GIESBERG, *Clerk.*
By WARREN WATSON, *D. C.*

Upon said peremptory mandamus the marshal of the United States, for said district, made the following return, to wit:

Marshal's Return.

I hereby certify that I executed the writ of which this is a duplicate, by leaving the same with each of the justices of the county court of Macon county, to wit: John P. Walker, Lee Lingo, and George L. Towner, said court not then in session; all done in the county of Macon, in the west district of Missouri, July 3, 1876, (8.)

C. C. ALLEN,
U. S. Marshal.
By C. C. CRIPPEN,
Deputy.

And afterwards, on the 8th day of July, A. D. 1878, it being in vacation of said circuit court, the following further proceedings were had in this case, to wit:

29 ALFRED HUIDEKOPER, Relator,
vs. } 1094.
MACON COUNTY COURT,

Bond Approved and Filed.

This day a bond for a writ of error in the above cause is presented to the Honorable Arnold Krekel, judge at chambers, and duly approved and ordered filed.

Which bond, for appeal, so filed as aforesaid, is in words and figures following, to wit:

Appeal Bond.

Know all men by these presents, That we, the county court of Macon, Missouri, as principal, and John P. Walker, Lee Lingo, and George L. Towner, as sureties, are held and firmly bound unto Alfred Huidekoper, in the full and just sum of five hundred dollars, to be paid to the said Alfred Huidekoper, his heirs, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 1st day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas, lately at the April term, A. D. 1878, of the circuit court of the United States, for the western district of Missouri, in a suit depending in said court between Alfred Huide-
30 koper, relator, and the county court of Macon county, Missouri, respondents; judgment was rendered against the said county court, and the said county court having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Alfred Huidekoper, citing and admonishing him to be and appear at the Supreme Court of the United States, to be held at Washington, D. C., on the 2d Monday of October next.

Now, the condition of the above allegation is such, that if the said county court shall prosecute said writ to effect and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Macon county, and the justices thereof—

By J. P. WALKER, [SEAL.]
President.

J. P. WALKER, [SEAL.]
G. L. TOWNER, [SEAL.]
LEE LINGO. [SEAL.]

Approved by—A. KREKEL, *Judge.*

STATE OF MISSOURI,
County of Macon, ss:

Before me, James W. Roberts, a notary public, commis-
31 sioned December 11, 1874, for four years, personally appeared before me, John P. Walker, Lee Lingo, and George L. Towner, who, upon their oath, state that they are each worth the sum of five hundred dollars over and above all

debts and exemptions of the homestead laws of the State of Missouri. This the 1st day of July, 1878.

Signed—

J. P. WALKER, [SEAL.]
G. L. TOWNER, [SEAL.]
LEE LINGO. [SEAL.]

Subscribed and sworn to before me, this 1st day of July, 1878.

[SEAL.] JAS. W. ROBERTS,
Notary Public.

32 UNITED STATES OF AMERICA,
Western District of Missouri, set:

I, Henry C. Geisburg, clerk of the circuit court of the United States, in and for said district, do hereby certify that the foregoing writing is a true transcript of the record and proceedings in case No. 1094, of Alfred Huidekoper, Relator, *vs.* Macon County Court, as fully as the same remain on file and of record, in my office.

Witness my hand as clerk, and the seal of said court. Done at office, in the city of Jefferson, this twenty-third day of September, 1878.

[SEAL.] H. C. GEISBERG,
Clerk.

(Endorsed on cover:) W. MISSOURI, C. C. U. S. No. 858. The County Court of Macon County, Plaintiff in Error, *vs.* Alfred Huidekoper. Filed, 12th October, 1878.

Dec'r 21. '78. Arg'd. M. St. Sworn

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, A. D. 1878.

THE COUNTY COURT OF MACON COUNTY AND THE JUSTICES THEREOF, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES EX REL. ALFRED HUIDEKOPER.

No. 858.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

JAMES CARR and
W. P. HALL,
Of Counsel for Plaintiffs in Error.

JEFFERSON CITY:
CARTER & REGAN, PRINTERS AND BINDERS.
1878.

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, A. D. 1878.

THE COUNTY COURT OF MACON COUNTY AND THE JUSTICES THEREOF, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES EX REL. ALFRED HUIDEKOPER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT OF THE CASE.

On the 15th day of April, 1878, the relator filed his information in the court below, in which he stated that on the 25th day of November, 1874, the relator recovered judgment against Macon county, Missouri, for $6,656.70, on coupons detached from bonds issued by said county on the 2nd day of May, 1870, to the Missouri and Mississippi Railroad Company, under and by authority of an act of the General Assembly of the State of Missouri, entitled, "An act to incorporate the Missouri and Mississippi Railroad Company," approved February

20, 1865, by the 13th section of which the County Court of Macon county was authorized and empowered to subscribe to the capital stock of said company, and to issue bonds in payment of such subscription, and to "levy a tax to pay the same, *not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year.*" That said one-twentieth of one per cent. is totally inadequate to pay the interest on the bonds issued by said county to said Missouri and Mississippi Railroad Company. That the relator's judgment is unpaid. That by the laws of Missouri the county court has power, and it is its duty, to audit, adjust and settle all accounts to which the county shall be a party, and to order the payment out of the county treasury of any sum of money due by the county; and upon ascertaining any sum of money to be due from the county, it should order its clerk to issue a warrant therefor, to be paid, with other warrants, in the order of presentation to the Treasurer. That a demand had been made on said county court to order the payment, out of the County Treasury of Macon county, of the amount of said judgment, and to order its clerk to issue and deliver to the relator a warrant therefor, which said demand had been refused. That relator is without adequate remedy at law, and he prayed for a writ of mandamus, commanding the plaintiffs in error, as Justices of Macon County Court, to direct their clerk to draw a warrant on the County Treasurer of Macon county for the amount of said judgment, interest and costs, *payable out of the general funds of the county that are now or may hereafter be in said Treasury.*

An alternative writ of mandamus, in which the foregoing allegations were stated, was issued on the 23rd day of April, 1878, and made returnable on the first Monday in May following. On that day the plaintiffs in error made return to said alternative writ of mandamus, in which they admitted the allegations in said information and alternative writ, and they then returned as follows:

"But respondents aver that each and every warrant which they are authorized by law, and by the statutes of the State, to order to be drawn by their clerk, must express upon its face the *particular* fund out of which it must be paid by the treasurer of the county, and said treasurer is expressly prohibited by the statutes of the State from paying such warrant out of any fund in the treasury other than the fund mentioned in such warrant.

For further return to said writ, respondents state that the county of Macon has no goods, chattels, lands or other property subject to levy and sale under execution, out of which said judgment or any part thereof could be made.

For further return to said writ of mandamus, respondents state that under and by virtue of an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865, the corporators therein named organized and accepted the provisions of said act, on the ——— day of September, 1866, and from that day said corporators became, and have been, a body corporate and politic, under the name of the "Missouri and Mississippi Railroad Company." That the 13th section of said act conferring said power to subscribe as aforesaid, reads as follows:

"SEC. 13. It shall be lawful for the corporate authorities of any city or town, or county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year."

That in and by the authority conferred upon the county court of Macon county in said section, and no other power or authority, said court on the 2nd day of April, 1867, subscribed the sum of one hundred and seventy-five thousand dollars to the capital stock of said railroad company, and issued bonds to it in payment of said subscription; that said subscription was made without the assent of two-thirds of the qualified voters of said Macon county, no election, regular or special, having been held in said county for the purpose of obtaining such assent, but, on the contrary, said subscription was made by said county court against the wishes of a very large majority of the qualified voters of said county.

Respondents further aver that afterwards, to-wit: on the 12th day of April, 1870, said county court made a second subscription of one hundred and seventy-five thousand dollars to the capital stock of said railroad company, and issued bonds in payment thereof, (from a portion of which the coupons in this suit were detached,) that said second subscription was made without the assent of two-thirds of the qualified voters of said county, no election, general or special, having been held in said county for the purpose of obtaining said assent, but, on the contrary, said subscription was made by said county court against the wishes of nine-tenths of the qualified voters of said county. That the money realized from both of said subscriptions and the bonds issued therefor have all been spent, and no portion of the Missouri and Mississippi Railroad has been completed, except seventeen miles between Salisbury, in Chariton county, and Glasgow, in

Howard county, and said portion of said railroad is so far from Macon county that it is no benefit to said county.

That the coupons, upon which the relator's judgment was obtained, were a part of the coupons taken from bonds issued in payment of the second subscription by Macon county to said Missouri and Mississippi Railroad Company; that ever since the issuing of said bonds in payment of said second subscription, said county court of Macon county, under, and by virtue of said act of the General Assembly, has levied every year a special tax of one-twentieth of one per cent. upon the assessed value of all the taxable property in said county, and authorized said special tax to be extended upon the tax-books of said county for each year, and had said special tax collected for the purpose of paying said bonds and interest, so far as the same would do so; that the tax thus collected is inadequate to pay all the interest on said bonds; that the aggregate valuation of the taxable property in Macon county for the year 1877, was four million eight hundred and fifty-three thousand five hundred and eighty-four dollars and fifty-seven cents; the valuation of the taxable property in said county for the year 1878, is four million nine hundred and sixteen thousand eight hundred and thirty-five dollars.

That the 11th section of the tenth Article of the Constitution of the State of Missouri limits the power of county courts in levying taxes for county purposes, as follows:

"For county purposes the annual rate on property in counties having six million dollars or less, shall not in the aggregate exceed fifty cents on the one hundred dollars valuation."

That by section 165, Chapter 118 of Wagner's Missouri Statutes, it is provided as follows:

"The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for State purpose * * * but the county tax in no case shall exceed one-half of one per cent. on the taxable property."

That these respondents have no authority to levy any other or greater tax for common fund purposes than fifty cents on the one hundred dollars valuation of the taxable property in the county in any one year; that such levy of fifty cents on the hundred dollars valuation constitutes the "common fund" of said county, upon which relator seeks to have a warrant drawn to pay his judgment against said county; that by the laws of the State of Missouri, the respondents, as Justices of the Macon County Court, are only authorized by

the Statutes of said State to order warrants to be drawn on the common fund of said county by the clerk of said Macon County Court on the treasurer of said county, as follows, and for no other purposes, viz: salaries and fees of all county officers for performing their respective duties imposed upon them by the laws of the State, for the support of the poor of said county, for the support of the county patients in the various asylums of the State, for the building and repairing of bridges, opening public highways, the payment of grand and petit jurors in the county, expenses of witnesses before the grand jury, and serving subpœnas for their attendance thereon, for books and stationary for county officers, and various and many other expenses too numerous to mention. That the payment of said salaries and expenses absorb all the said tax of fifty cents on the one hundred dollars valuation when prudently and economically applied, so that there is no money left in the county treasury with which to pay a warrant, if drawn in favor of relator on the county treasurer, for the amount of his said judgment, interest and cost.

That if these respondents should draw such warrant, it would take money which legitimately and properly is only applicable to the purposes hereinbefore stated, and it would entirely suspend and disorganize the county government of Macon county.

That these respondents, as Justices of the Macon County Court, have no legal power or authority to levy any other or greater tax than is hereinbefore stated.

That the relator, under the laws of the State of Missouri, is not entitled to any portion of the common fund of said county until all of the fees and expenses necessary to the running and operating of the county government have been first paid, and the said fees and expenses absorb all the money arising from said tax of fifty cents on the one hundred dollars valuation of the property in Macon county, annually. That the relator is only entitled to his pro-rata part of said special tax of one-twentieth of one per cent. so levied and collected upon the taxable property in said county in each year, with all other creditors of said county who have judgments as aforesaid on bonds and coupons thereon, and the interest on other bonds as aforesaid, and coupons thereon still outstanding, issued to said railroad company as hereinbefore stated, and is not entitled to a warrant on this common fund, or any other fund of said county, except that created by said special levy of one-twentieth of one per cent. That there are judgments which have been rendered upon said bonds and coupons, issued as aforesaid, against said county, aggregating from fifty to sixty thousand dollars in favor of various parties, rendered in the United

States Circuit Court for the Western District of Missouri, and in the circuit court of Macon county, Missouri, which remain unpaid and unsatisfied, and said county has no property or money out of which to pay the same.

Wherefore, these respondents say that the relator is not entitled to have a warrant drawn on the common fund of Macon county upon the treasurer of said county, for the amount of his judgment, interest and costs, or any part thereof, and pray the court that the county government may be by it fully protected against the claims of the relator for a warrant as prayed, and that they be discharged with their proper costs."

To this return the relator demurred the same day, on the ground that said return does not state facts sufficient to constitute in law any cause why the relator should not have the relief prayed for in his information. The same day the court below sustained said demurrer, and rendered judgment in favor of the relator as prayed for in his information.

Thereupon the plaintiffs in error sued out a writ of error and have brought this case to this court.

ASSIGNMENT OF ERRORS.

On this record the plaintiffs in error assign the following errors, viz:

1st. That the court below erred in sustaining the relator's demurrer to said return made by plaintiffs in error.

2d. That said court erred in rendering judgment that plaintiffs in error should direct their clerk to draw a warrant on the County Treasurer of Macon county, in favor of the relator, for the amount of his judgment, interest and costs, payable out of the *general funds* of the county that were there, or might thereafter be in the treasury of said county.

BRIEF.

On the record in this case the plaintiffs in error make the following points and rely on the following authorities to support them:

I.

Counties are political divisions of the State, and county courts are branches of the State Government, established for public and governmental purposes.

Reardon vs. St. Louis County, 36 Mo., 561.

St. Louis Police Commissioners vs. St. Louis County Court, 34 *id.*, 546, 572.

Steines et al vs. Franklin County, 48 *id.*, 188.

Ray County vs. Bentley and Barr, 49 *id.*, 236.

State vs. Walker, p. 370, Vol. 7, Central Law Journal.

II.

A railroad company is a *private* corporation. Subscribing to the capital stock of a railroad company is not one of the purposes for which government is established. Hence, any law which authorizes a county court, without the assent of the tax-payers, to subscribe to the capital stock of a railroad company, and thereby impose a tax upon them, should be *strictly* construed.

Hanson vs. Vernon, 27 Iowa, 28.

Whiting vs. Sheboygan and Fon Du Lac R. R. Co., 25 Wis., 167.

People ex rel, vs. Salem, 20 Mich., 452.

Loan Association vs. Topeka, 20 Wall., 555.

Sweet vs. Hurlbert, 52 Barb., 313.

III.

If there is any *doubt* about the right to levy the tax for the payment of the subscription or the bonds issued in payment o[illegible] doubt should be resolved against the bondholder and in fav[illegible] tax-payers. N. W. Fairbanks 868 v Hoyle 2

Bailey vs. Maguire, 22 Wall., 215 Nov. 30, 1871

Pennsylvania R. R. Co. vs. Canal Co., 20 Pa., 9.

Rice vs. Railroad Co., 1 Black, 580.

IV.

The qualified voters of Macon county not having given their assent to the making of the subscriptions in question, no election, regular or special, having been held for that purpose, the county court of Macon county had no authority for making said subscriptions, except the authority which was conferred by the 13th section of the charter of the Missouri and Mississippi Railroad Company.

Carpenter vs. Lathrop, 51 Mo., 484.

State *ex rel.* Wilson vs. Garroutte, p. 29, Vol. 7, Central Law Journal.

Leavenworth and Des Moines R. R. Co. vs. Platte County Court, 42 Mo., 171.

V.

This section entered into and became a part of the contract under which said subscriptions were made, and the bonds issued in payment of them, as fully, to all intents and purposes, as if it had been copied into the contract in *ipsissimis verbis*. Whatever rights the relator has in the premises are conferred by said section, and whatever liabilities and duties are imposed on the county and the plaintiffs in error, as the Justices of Macon County Court, are imposed by the same section.

State vs. Walker, *supra*.

Von Hoffman vs. City of Quincy, 4 Wall., 554.

Hawthorn vs. Calef, 2 *id.*, 10.

Cooley, Con., Limitations, 285.

State vs. Shortridge, 56 Mo., 126.

This section *creates* the right, and at the same time provides the mode for enforcing this right. This mode is *exclusive* of all other modes. *Expressio unius est exclusio alterius.* Hence, the relator has no right to resort to any other mode or fund to enforce the payment of his judgment than the mode prescribed in said 13th section.

Lindell's Admr's vs. Hannibal and St. Joseph R. R. Co., 36 Mo., 343.

Leary vs. Same, 38 *id.*, 485.

VI.

The debt in controversy is not a debt incurred in the ordinary administration of the county government. Hence, the statutes which govern the rights of creditors holding such debts, and the correlative duties imposed on the county, and the plaintiffs in error, in regard thereto, do not apply to the debt held by the relator. In not regarding or making the distinction between these two classes of debts, consists the error into which the majority of this court fell, in the case of the United States vs. County of Clark, 96 U. S., 211.

Pettis County vs. Kingsbury, 17 Mo., 479.

Kingsbury et al., Ex'rs, vs. Pettis County, 48 Mo., 208

State ex rel. Zimmerman vs. Bollinger County Court, *ibid* 475.

Campbell vs. Polk County, 49, *ibid* 214.

State vs. Shortridge *supra*.

State vs. Walker, *supra*.

United States vs. Baltimore & Ohio R. R. Co., 17 Wall., 322.

VII.

The Constitution and Statutes of the State limit the county courts to the levy of "such sums as may be annually necessary to defray the expenses of their respective counties, * * * * but the county tax shall in no case exceed one-half of one per cent. on all the taxable property."

Sec. 11, Art X. of Constitution.

Sec. 165, p. 1193, Wagner's Statutes.

This, then, is the common fund, or ordinary revenue of the county, levied and collected for the express purpose of defraying the ordinary current expenses incurred in administering the county government. The relator's debt is not one of those debts. It is an extraordinary debt, and, hence, it is not entitled to come in and share the money collected for the purpose of supporting the poor and insane poor of the county, building bridges and highways, defraying the expenses of punishing criminals, paying justices of the county court for holding court and attending to the interests of the State and county, paying sheriffs, collectors and county clerks their salaries and fees, paying grand and petit jurors for services as such, and many other expenses.

Even if the relator was entitled under his contract to any portion of this tax, which we most emphatically deny, the return shows that the plaintiffs in error have levied the maximum rate of tax which they are authorized by the Constitution and Statutes to levy; and that the proceeds of said tax, prudently and economically applied, are all absorbed in defraying the necessary expenses of administering the county government, as is shown by the return, and this fact is admitted by the demurrer. Hence, there is no money left in the county treasury to pay such warrant, and the drawing of a warrant would be a fruitless act. The law never compels a court to do a fruitless act.

High on Ex. Legal Remedies, §352.

VIII.

The money realized from this levy cannot legally be applied to any other debt than one incurred in administering the county government.

Collector vs. Day, 11 Wall., 113, and authorities there cited.

United States vs. B. & O. R. R. Co., 17 *id*, 322.

Edgerton vs. Municipality, 1 La. An., 435.

Dobbins vs. Commissioners of Erie County, 16 Pet., 435.

The plaintiffs in error, as Justices of Macon County Court would be *criminally* liable for embezzlement and conversion of the money which had been levied and collected "to defray the expenses of their county," if they were to draw a warrant on the fund in favor of the relator. No court, by mandamus ever compelled an inferior court, tribunal or officer to violate the criminal Statutes of a State.

Session Acts, 1874, § 1, p. 45. 49 Mo. 484

Although the county court which made the subscriptions and issued the bonds in question was *faithless* to the trust reposed in it by a generous constituency, and thereby foisted this large debt on the tax-payers of the county, still that does not justify the plaintiffs in error in violating both the civil and criminal statutes of the State in drawing a warrant in contravention of these statutes. They intend to be true to the trust reposed in them.

A penalty implies a prohibition.

State *ex rel.* Wilson vs. Garroutte, p. 29, vol. 7, Central L. Journal.

Downing vs. Ringer, 7 Mo., 585.

IX.

Mandamus does not and cannot create rights and duties. It only lies to compel the performance of those already existing.

Supervisors of Carroll county vs. United States, 18 Wall, 77.

State vs. Shortridge, 56 Mo., 126.

State vs. Walker, *supra*.

X.

This court follows the decisions of the highest court of a State construing its own constitution and statutes. 22 Wall. 215

Leffingwell vs. Warren, 2 Black., 599.

Green vs. Neal, 6 Pet., 291.

United States vs. Morrison, 4 *id.*, 124.

The Supreme Court of the State has repeatedly construed its Statutes applicable to this subject; and it has uniformly construed them against the claim of a creditor whose debt (as in this instance) was contracted with reference to payment out of a *particular* fund, that such creditor could not resort to the common fund of the county, if the particular fund should be insufficient to pay his debt.

State vs. Walker, *supra.*

Pettis County vs. Kingsbury, 17 Mo., 479.

Kingsbury *et al.* Ex'rs vs. Pettis County, 48 *id.*, 248.

Campbell vs. Polk County, 49 *id.*, 214.

Heine vs. Levee Commissioners, 19 Wall., 660.

There is nothing in a bondholder's debt that makes it more sacred or of higher obligation than a debt incurred in building a bridge and contracted with reference to payment out of the road and canal fund, and that fund turns out to be *insufficient.* If the road and canal fund shall be insufficient, the creditor cannot resort to the common fund of the county for payment of the residue. (Pettis County vs. Kingsbury, *supra.*)

If this debt stood upon the same footing as a debt incurred in administering the county government, why was there a seperate machinery furnished for creating, and providing for the payment of debts contracted by counties, cities and towns in subscribing to the capital stock of railroad companies and issuing bonds in payment of such subscriptions? Why were limitations of the amount that counties, cities and towns could subscribe? Why were county courts, city and town councils limited by the Revised Statutes of 1855, and also by the General Statutes of 1865 and Wagner's Statutes, when the subscriptions were made under said Statutes, to the levy of a tax "in any one year," which "shall *not exceed thirty per centum of the subscription* made by such county or city?"

§§ 30, 31, p. 427, Rev. Statutes, 1855. 81 Mo. 22

§§ 17, 18, p. 338, General Statutes, 1865.

§§ 17, 18, p. 305, Wag. Statutes, 1870.

Would there not be as much propriety in the United States Treasurer paying a debt incurred in improving rivers and harbors out of the fund appropriated and set apart by act of Congress for paying the expenses necessary in administering the Department of Justice, as for the plaintiffs in error, as Justices of Macon County Court, to draw a warrant for the amount of the relator's judgment on the common fund of the county which had been levied and collected "to defray the expenses" of administering the county government?

Let it be conceded for the sake of the argument, that the relator is entitled to a warrant on the common fund of the county for the payment of his judgment. What would be the effect upon the county government? The Constitution and Statutes of this State *limit* the county court in levying a tax which "*shall in no case exceed one-half of one per cent. on all taxable property.*" (§ 165, p. 1193, Wagner's Statutes.) Now, the return states that the plaintiffs in error, as Justices of Macon County Court, have levied the maximum rate of tax authorized by the Constitution and Statutes, and that, prudently and economically applied, it is all absorbed in administering the county government; and that if the relator's and other judgments rendered against the county on the same kind of bonds and coupons shall be paid out of the common fund of the county, there will be nothing left to pay the current expenses of administering the county government, and the effect of drawing a warrant on the common fund would be to disorganize it for want of money with which to pay the salaries of its officers who carry it on. These facts are all admitted by the demurrer to the return. The county court of a county "is a part of the State government." (Reardon vs. St. Louis County, 36 Mo., 560.) Will this court by its decision affirm a judgment which will produce such anarchical effect?

It is the policy of all civilized nations to sustain their government. The rights of the government are always held paramount to those of the citizen. It is upon this principle that the salary of a public officer is not subject to garnishment for the payment of his debts, the presumption being, that he would not be able to perform his duty to the public without the regular payment of his salary.

Hawthorn vs. St. Louis, 11 Mo., 59.

Fortune vs. Same, 23 *id.*, 239.

Erie vs. Knapp, 29 Pa., S. 173.

The Collector vs. Day, 11 Wall., 113.

1 Dillon vs. Municipal Corp., §§ 64, 65.

§ 3, p. 664, Wag. Statutes.

§ 10, p. 604, *ibid.*

It is upon the same principle that the government drafts citizens into its military service, forcing them away at the point of the bayonet, if necessary, from father, mother, brothers, sisters, wife, children, friends, home, from everything that is near and dear to them, and places them in front of the enemy, in the valley of the shadow of death, to fight, to bleed, to get crippled for life, perhaps to die. It is upon the same principle that government is always a preferred creditor against every man's estate, solvent or insolvent.

1 Kent, 262.

Rev. Statutes U. S., § 5101, p. 988.

Wagner's Statutes, § 1, p. 191.

"The government was a privileged creditor under the Roman law, and entitled to *priority* in the payment of debts. The *cessio bonorum* was made subject to this priority. This is generally the case in all modern bankrupt and insolvent laws. In England, the King's claim is preferred to that of a subject, provided the King's process was commenced before the subject had obtained judgment."

1 Kent, p. 269, (10th Ed.)

The property owned by a county cannot be taken on execution for the payment of its debts. Why? Because it is necessary in administering the county government. Why should the revenue of a county expressly levied and collected "to defray the expenses" of the county in administering the county government be taken for an extraordinary debt? Does not the same reason exist for the exemption of the county revenue from seizure for the payment of an extraordinary debt, as exists for exempting the county property from execution?

Sec. 10, p. 604, Wag. Statutes.

Sec. 3, p. 664, *ibid.*

A county is a political division of the State, and the county court of a county "*is a part of the State government, with specific powers, duties and functions*, generally local to the county, it is true, but derived from the State, and not from the county."

Reardon vs. St. Louis County, 36 Mo., 561.

St. Louis Police Commissioners vs. St. Louis County Court, 34 *id.*, 546, 572.

Steines et al. vs. Franklin County, 48 *id.*, 188.

Ray County, &c., vs. Bently and Barr, 49 *id.*, 236.

County courts are only agents of the county, with no powers except such as are granted, defined and limited by statute, and like other agents, they must pursue their authority, and act within the scope of their powers. And they cannot create any greater liability on the county than the statute under which they act authorizes them to do.

Steines vs. Franklin County, 48 Mo., 167.

Walcott vs. Lawrence County, 26 *id.*, 272.

City of St. Louis vs, Gorman, 29 *id.*, 593.

State vs. Saline County, 48 *id.*, 390.

The return shows that the effect of drawing a warrant upon the common fund of the county would be to disorganize the county government. The county court "is a part of the State government." This court certainly will not lend itself to any such anarchical act by holding that the relator is entitled to a warrant on the common fund of the county. Moreover, under the laws of the State it is made a criminal offense for "any member of any county court..... .... to knowingly vote for the appropriation, disposition or disbursement of any money or property belonging to any ..... county.....other than the *specific use* for which the same was devised, appropriated and collected."

Session Acts, 1874, § 1, p. 45.

State vs. Pinger, 57 Mo., 203.

State vs. Hein et al., *id.*, 362.

State vs. Clarkson, 59 *id.*, 149.

Wagner's Statutes, sec. 41, p. 459.

Ibid., §§ 9, 18, p. 412.

The section, authorizing the respondents, as justices of Macon County Court, to order the warrant to be drawn, and the section, which empowers the county courts "to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property, and licenses made taxable by law for State purposes," (Wag. Stat., § 165, p. 1193,) should be so construed as not to disorganize or stop the wheels of the county government, although

such construction might result in the county's judgment creditor not being paid anything out of the common fund of the county, which had been levied and collected for the express purpose of defraying the expenses of the county.

A public exigency frequently compels courts to give a construction to a statute contrary to its literal import. For instance, it has been held by this court a statute of limitations will not run during a state of war, although that is not mentioned in the statute as one of the exceptions which will prevent it from running.

Hauger vs. Abbott, 6 Wall, 532.

The Proctor, 9, *id.*, 687.

The following authorities hold that the current expenses of the county must be first paid before a general judgment creditor of the county is entitled to be paid, and the decisions are based on the inexorable necessity that the county government must live, and the rights of the citizen are always subordinated to those rights.

Grant vs. City of Davenport, 36 Iowa, 401.

Coffin vs. same, 26 *id.*, 515.

Iowa Railroad Land Co. vs. County of Sac, 39 *id.*, 134.

French vs. Burlington, 42 *id.*, 618.

Von Hoffman vs. City of Quincy, 4 Wall., 549.

Commonwealth vs. Commissioners of Lancaster County, 6 Binney, 5.

Same vs. Commissioners of Philadelphia County, 1 Wharton, 1.

Same vs. same, 2 *id.*, 286.

High on Ex. Legal Remedies, § 352.

The county court of Macon county was induced to make the subscriptions and issue the bonds in question in payment thereof, by the representations of the officers and agents of the Missouri and Mississippi Railroad Company and parties who expected to get fat contracts for building the road, that the building of the road would draw such an immigration into, and develop the resources of the county so greatly, that the taxable property of the county would be so much enhanced in value, that a tax of one-twentieth of one per cent. would be ample to pay the bonds and accruing interest. The same representations, doubtless, were made to the purchasers of the bonds. Unfortunately, "the best laid schemes o' mice and men gang

aft aglee." The road never was built, and the promised enhancement of value of the taxable property of the county did not come. The result is that "a tax * * * not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year," is wholly inadequate to pay even the annual interest on the bonds.

The holders of Macon county bonds are in the same category with other creditors who have loaned money on an inadequate security. The debt is a valid legal debt, but the debtor is insolvent, and, like any other insolvent debtor, payment cannot be coerced by law. This is the creditor's misfortune. He should not have loaned his money on the security offered. He had ample means for ascertaining the value, or adequacy of the security, and if he has misjudged it, he is in the predicament of many thousands of creditors. The records of the bankrupt courts show long lists of them. But this does not justify the respondents in helping the bondholders of Macon county out of a bad bargain, by violating both the civil and criminal statutes of the State, in ordering warrants to be drawn in their favor for the amounts of their bonds and coupons. They are entitled to the levy of "a tax * * * not to exceed one twentieth of one per cent. upon the assessed value of the taxable property for each year." *Ita lex scripta est.* The plaintiffs in error have no authority to recede from it, and the bondholders must stand to and abide by it. Says Mr. Justice Miller, in delivering the opinion of this Court, in the case of Heine vs. The Levee Commissioners, (19 Wallace, on p. 660,) which was a bill in equity to compel them to levy a special tax to pay off some levee bonds issued by the parishes of Carroll and Madison, in the State of Louisiana:

"There does not appear to be any authority founded on the recognized principles of a court of equity, on which this bill can be sustained. If sustained at all, it must be on the very broad ground that because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of the court of equity to devise some mode by which it can be done. It is, however, the experience of every day, and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune, which, in the imperfection of human nature, often admits of no redress. The holder of a corporation bond must, in common with other men, submit to this calamity, when the law affords no relief."

Rees vs. Watertown, 19 Wall.

The relator bases his right to have a warrant drawn on the common fund of Macon county, on the decision of the majority of justices of this court, in the recent case of the United States *ex rel.* William A.

Johnston vs. Clark county court. That case was not argued orally, and the brief of the attorneys for Clark county court did not call the attention of the court to the decisions of this court, which are cited in this argument, construing our statutes on that subject; and on reference to the opinion delivered on behalf of the majority of the court, it will be seen that the construction placed upon our statutes is in direct conflict with the decisions of the Supreme Court of Missouri, heretofore rendered.

It is very evident that this court did not understand the construction placed upon our statutes, from the following remark, viz:

"And State vs. Shortridge, though claimed to be in point, is equally inapplicable when it is observed what the case was and what was decided. It was a suit for a mandamus to compel the county court of Macon county to levy a tax for the payment of the principal and interest of several railroad bonds, issued in payment of a subscription by the county to the capital stock of the Missouri and Mississippi Railroad Company. The bonds had been issued by virtue of a legislative act, *similar* to that under which the bonds of the present relator were issued."

Now the fact is, that instead of the bonds in that case having been issued by virtue of "a legislative act, *similar* to that under which the bonds" in the Clark county case were issued, they were issued under the *very same* act by virtue of which the bonds in the case of the State vs. Shortridge were issued.

The error in the opinion of the majority of the court in the Clark county case consists in treating the debt as one incurred in the *legitimate* administration of the county government, and for the payment of which the county court is bound by the statute to adjust, and order a warrant to be drawn on the common fund of the county. Now the debt in controversy is no such debt. On the contrary, it is one which the county court had no authority to contract, except in the manner and on the conditions prescribed as heretofore shown. And when legally contracted, it can only be paid in the manner prescribed by the law under which the debt was created.

The return in this case sets up such a state of facts, and so different from the facts stated in the return in the case of the United States ex. rel. Wm. A. Johnston vs. County Court of Clark county, (96 U. S., 211,) that that case cannot be held to be a precedent to rule this case.

The first thing which strikes the eye upon entering the State Capitol, is the coat of arms of the State, over the door, leading into the rotunda, with this motto inscribed upon it: *Salus populi*

suprema lex esto. The true principle upon which all government is based is couched in this motto. Then let this court by its decision give practical effect to this motto, by proclaiming to the world that the revenues of the county of Macon, levied and collected for the purpose of administering the county government, shall never be diverted and perverted to the payment of an extraordinary debt foisted on the tax-payers of the county by a faithless county court without their consent.

In every aspect then, in which this case can be viewed, the judgment of the court below was erroneous, and should be reversed.

JAMES CARR, and
W. P. HALL,
Of Counsel for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 858.

THE COUNTY COURT OF MACON COUNTY,
PLAINTIFF IN ERROR,

vs.

ALFRED HUIDEKOPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

JOSEPH SHIPPEN,
Attorney for Defendant in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 858.

THE COUNTY COURT OF MACON COUNTY,
PLAINTIFF IN ERROR,

vs.

ALFRED HUIDEKOPER, DEFENDANT IN ERROR.

In error to the Circuit Court of the United States for the Western District of Missouri.

BRIEF OF THE DEFENDANT IN ERROR.

ARGUMENT.

I.

THE CASE.

UNITED STATES *vs.* THE COUNTY OF CLARK, 96 U.S., 211, HAS DECIDED IN FAVOR OF THE DEFENDANT IN ERROR, THE RELATOR BELOW, EVERY QUESTION PRESENTED BY THIS RECORD.

The two cases are alike in every essential, and this case was decided by the court below conformably to that case as an authoritative precedent.

In each case a judgment creditor obtained an alternative writ of *mandamus*, to which respondent, plaintiff in error, made return, and the relator demurred thereto, on the

Butz *v.* Muscatine, 8 Wall., 575, 585.
Olcott *v.* Supervisors, 16 Wall., 678, 688.
Pine Grove Township *v.* Talcott, 19 Wall., 666, 678.
Town of Venice *v.* Murdock, 92 U. S., 494.

This principle applies unquestionably with full force to the case at bar. Commercial securities are involved. When the bonds were issued there had been no intimation from any quarter as to the purchaser being confined for payment to his share of an uncertain fund.

Even if, as contended by defendant, the supreme court of Missouri never passed on the clause of limitation until after the bonds were issued and negotiated, this court is not bound "to yield to the authority of the courts of Missouri and abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary, and thereby render the exercise of its appellate jurisdiction but a solemn mockery."

4. The case of State *ex rel.* Watkins *v.* Walker was a collusive suit, designed to overthrow the decision of this court in United States *v.* the County of Clark, 96 U. S., 211, and confessedly to affect suits pending in the United States circuit court for the western district of Missouri, and to forestall the decisions of this Court in the cases at bar.

This is patent from the records (see pamphlet.)

January 7, 1878, the Clark County case was decided.

January 25, 1878, information filed for mandamus in the Macon county circuit court,----------page 1
Same day, alternative writ issued----------3
Same day, returns made by respondents----------5
Same day, demurrer to returns by relator----------11
Same day, case submitted to circuit court----------12
Next day, judgment rendered for respondents----------12

April 10, 1878, respondents granted relator a warrant for the amount of his judgment---------- ----------14
April 29, 1878, transcript filed in State supreme court---14
Same day, submission by agreement under 21st rule----14
Same day, relator's brief filed, consisting of two pages and citing only the Clark County case----------15
May 13, 1878, respondents move to have case advanced, which was granted on the express grounds of pending litigation in the Federal courts against them in two cases, one of which is case No. 858 *in this Court*----------18
October 30, 1878, decision of supreme court rendered. Napton, J., not sitting, and Hough, J., in part dissenting---------- ---------- ---------- ----------23
Comment is unnecessary.

III.

THE CASE.

UNITED STATES *ex.* THE COUNTY OF CLARK, 96 U. S., 211, WAS ON PRINCIPLE AND AUTHORITY, DECIDED CORRECTLY, EVEN IF IT WERE TO BE RECONSIDERED.

The two points of that decision were:

1st. The debt created under the 13th section of the charter of the Missouri and Mississippi Railroad Company was a *general liability*, and the creditor was *not* confined to the proceeds of the special tax of twentieth of one per cent for payment.

2. It was the duty of the county court to issue to the judgment creditor a *warrant* upon the county treasury payable out of the general fund of the county.

In support of the correctness of this court's first proposition reference is made to the brief and argument of the plaintiff in error in the case No. 98, October Term, 1878;

by stipulation herewith argued and submitted. Suffice it here to say that the 13th section of said railroad charter first received judicial construction in 1867 by the supreme court of Missouri in the leading case of *State ex rel Missouri and Mississippi Railroad Company* vs. *the County Court of Macon County*, 41 Mo., 453.

That was a proceeding in *mandamus* brought by the Railroad Company to compel the issue of $175,000 of bonds by Macon County in payment of its stock subscription; and the supreme court of Missouri compelled their issue. This was followed as a precedent by many similar decisions, and in one of them in 1873 that court said:

"Millions of dollars have been invested on the faith of such decisions, and it would be a bold and hazardous experiment to undertake a new investigation of the subject."

Osage Valley and S. K. Railroad Company *vs.* Morgan County Court, 53Mo., 156.

In support of the correctness of this court's second proposition, in addition to the reasoning adopted in the opinion of the court, attention is asked to the following statutes and suggestions.

The powers and duties of the county courts of Missouri are prescribed by the general statutes under the heads—

County Court, 1 Wagner's Statutes, 439.
County Treasuries, id., 409.

The sections *most* pertinent to the present questions are as follows:

PAGE 441, SEC. 9. "The said [county] courts shall moreover have the control and management of the property, real and personal, belonging to the county; and shall have full power and authority to purchase or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods, or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

PAGE 414, SEC. 28. "Each county court shall have power to audit, adjust, and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county; to enforce the collection of money due the county, &c., &c."

PAGE 415, SEC. 31. "When the court shall ascertain any sum of money to be due from the county they shall order their clerk to issue a warrant therefore in the following form:

"Treasurer of the county of ———. Pay to ——— ——— ——— dollars, out of any money in the treasury appropriated for county expenditures [or express the particular fund as the case may require.] Given at the court house this —— day of ———, 18—. By order of the county court. A. B., *President.*

"Teste: C. D., *Clerk.*"

SEC. 32. "Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same; and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in Roman letters without ornament; it shall be signed by the president of the county court whilst the court is in session, attested by the clerk, and numbered progressively throughout the year."

By said statutes the duties of the county treasurer are also prescribed.

1. *Wagner's Statutes*, 409, 410, *sec.* 8. "He shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of which he is the treasurer, stating correctly the date, amount, number, in whose favor drawn, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrant, and in the order in which they shall be presented."

From above statutory provisions it is evident that the county treasury is guarded and controlled by the county

court, upon whose warrants or orders the treasurer, as the immediate custodian of the funds, is to make disbursements. Hence to effect appropriation and payment, the county court is the chief actor.

But it is *absurd* to contend that the county court in performing its duty of issuing a warrant for the payment of a judgment rendered against the county in a court of competent jurisdiction is exercising judicial functions. It is not constituted by law a supervisory or appellate judicial tribunal to ascertain the correctness of, or in other words to review, the conclusion reached by the United States circuit court having jurisdiction of the subject matter and of the parties. The very statement of so astounding a proposition carries with it its own refutation.

And yet it is gravely propounded and laid down as the law by the supreme court of Missouri in its last utterance on this subject in the main case now cited and relied on by the plaintiff in error.

> State *ex rel.* Watkins *vs.* Walker *et al.*, justices of the Macon County Court. (Unreported; see pamphlet, p. 38.)

Therein it is expressly decided "that in the ascertainment of what is due, and the fund out of which it is to be paid, (both of which must be determined before a warrant can be drawn,) the court is acting judicially." "The utmost that we could do would be to direct the county court to proceed and render judgment when they refused to act, and if in acting it renders a wrong judgment the remedy is by appeal, which is allowable under our statute, from all judgments and orders from the county court, when not expressly forbidden."

From these legal conclusions it inevitably follows, that a creditor who has reduced his claim to a judgment in the United States circuit court, perhaps, after having carried his case through this court, is required to submit the same for ascertainment to the county court of the debtor county,

and if its decision proves different from the conclusions of the Federal tribunals, his remedy is by appeal therefrom to the circuit court of the same county, and thence by appeal to the supreme court of the State of Missouri. Thus litigation begun and concluded in the Federal courts would be subject to the subsequent action of *three* State tribunals, the last of which, according to its own views, is really the ultimate arbiter of the rights of parties, the court of last resort. Litigation begun in the United States circuit court would, in due course of years, terminate in the supreme court of Missouri. Can any one doubt the result?

But such is not the law on this subject as it is well defined:

1st. By the numerous decisions of this Court.

2d. By the current practice of the United States circuit courts for the district of Missouri.

3d. By the numerous consistent decisions heretofore rendered by the supreme court of Missouri.

I. In Supervisors *vs.* United States, 4 Wall., 447, a mandamus case for the levy of a tax, this Court says: "The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, is too obvious to require remark. This case does not fall within the latter category."

In Heine *vs.* Levee Commissioners, 19 Wall., 657, it is said: "It has been decided in numerous cases founded on the refusal to pay corporation bonds that the appropriate proceeding was to sue at law, and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the corporation could be found liable to such execution and sufficient to satisfy the judgment. Then if the corporation had authority to levy and collect taxes

for the payment of that debt, a mandamus would issue to compel them to raise by taxation the amount necessary to satisfy the debt." Citing numerous cases.

Dillon on Municipal Corporations, § 685 and note.

High on Extraordinary Remedies, p. 249, § 351 and citations.

Smith & Co. *vs.* Commissioners of Tallapoosa County, 2 Wood, 596.

II. In the United States circuit courts for Missouri the practice in municipal bond cases is well settled that the functions of the officers are ministerial and not judicial.

In United States *vs.* Vernon County, 3 Dil., 281, it appears from the statement of the case that the Vernon County court had been required to issue its warrant on the county treasury by the mandate of that court, and the point therein decided is, that, by a second mandate, the respondent would be required to levy a tax to pay such warrant.

That court proceeded on the theory that, as it was informed the money was already in the treasury for the purpose, it would not require the county court to do what it had already done, viz: levy and collect a tax to raise money, which money, so raised, was already in the treasury; and again, that, as it had the power to compel a levy, it had the power to compel the application of what had been already levied and collected. The greater power includes the less.

3. "A judgment in the final determination in the rights of the parties to the action."

2 Wagner's Missouri Statutes, 1051, § 1.

The supreme court of Missouri, in numerous consistent decisions, has hitherto uniformly held that county courts, in administering county affairs, exercised ministerial, and not judicial functions.

The contrary was held for the first time in State *ex rel.* Watkins *vs.* Walker *supra.*

In Sparks *v.* Purdy, 11 Missouri, 225, (1847,) it it said:

"The duties of the county court are various. Some of them are merely ministerial, some judicial; when acting judicially within the sphere of their jurisdiction, they, like all other tribunals, are protected from suits for errors they may commit. But when they act ministerially, they, like other ministerial officers, are liable for a breach of the law. We cannot consider that the making of the order above cited was a judicial act. The proceeding had none of the characteristics of a judicial one; there were no parties; no notice; no pleadings; no trial; no judgment. It was a mere order respecting the public property, such as an individual might give relative to his own."

In Hannibal & St. Joseph Railroad Co. *vs.* Marion county, 36 Missouri, 303, it is said:

"The county court is instituted by law with certain specific powers and jurisdictions in relation to probate and testamentary matters, the appointment of guardians, &c., and also has the control and management of the property, real and personal, of the county. It is the agent of the county, and has full power and may lawfully, and of right, do whatever is necessary to carry out and execute the trusts reposed in it."

In the County of Marion *vs.* Phillips, 45 Mo., 77, it is said:

"The county judges are in most matters the agents and representatives of their respective counties. As a board called the County Court they audit claims against it, make appropriations, assess taxes, loan and distribute the school fund, * * * look after and settle with its financial agents and in general transact the county business. Many of their acts, as in auditing claims and settling the accounts of treasurer and collector, have been sometimes called, judicial because it is incumbent on the court to decide—to adjudicate as it were—upon the claim or account. But this decision is more like that of a party or agent than of an impartial tribunal with the parties before them. They decide very much as every private person or financial agent of a firm or corpo-

ration decides upon an account presented. They decide as all public auditors decide when claims or accounts are presented for adjustment, and if their action is judicial, then our auditor of public accounts is so far a judge, and holds a court of record; for, in auditing claims, his duties are precisely those of the county court. This term has been applied to their action from the poverty of language, for the same reason that the word "court" has been used in so many different senses. If they had been called supervisors or commissioners, and their organization a board, as in many States, the application of this term to their action might have been less frequent. But though we sometimes so apply the term, we do not conform our action to that idea. If passing upon a claim against the county is judicial action, and its rejection a judgment against the claimant, he would be concluded by it. The matter would be *res adjudicata;* and yet suits are brought every day to recover claims rejected by the county court. Their action is simply evidence that the county refuses to pay them, and is the occasion of, if not a necessary step to, the action, instead of a bar to it."

In Phelps County and Bishop, 46 Mo., 68, a party whose claim had been rejected by the county court brought a writ of *certiorari* to review the proceedings, but the writ was quashed by the Supreme Court, which said:

"The auditing of a demand against the county by the county court is not a judicial proceeding, and the entry of its allowance or rejection is not a judgment. The county judges are the agents, the representatives, of the county, and it is their duty to audit and pay all just and lawful claims against it; and, in performing that duty, they act precisely as would the agents of a private corporation. For that purpose they do not constitute a court in its proper sense, and the entry upon the record of their proceedings is not a judicial record. If a specific claim be rejected, the county may be sued upon it, and its rejection is no *res adjudicata.*"

In Re Saline county Subscription, 45 Mo., 52, in deciding that the action of a county court in subscribing to railroad stock and issuing bonds for payment thereof is a discre-

tionary and not a judicial proceeding, and therefore not the subject of review by writ of *certiorari* the Supreme Court says:

"Judicial action is an adjudication upon the rights of parties who in general appear or are brought before the tribunal by notice or process, and upon whose claims some decision or judgment is rendered. It implies impartiality, disinterestedness, a weighing of adverse claims, and is inconsistent with discretion on the one hand—for the tribunal must decide according to law and the rights of the parties—or with dictation on the other, for in the first instance it must exercise its own judgment under the law, and not act under a mandate from another power. The tribunal is not always surrounded with the machinery of a court, nor will such machinery necessarily make its action judicial. A county court is certainly a judicial body for some purposes, but no more so for the name nor for the fact that it has a seal and a clerk and keeps a record. The character of its action in a given case must decide whether that action is judicial, ministerial, or legislative, or whether it be simply that of a public agent of the county or State, as in its varied jurisdiction it may by turns be each.

"Our decisions upon the various subjects of county court jurisdiction, in relation to their character as judicial or otherwise, have been generally consistent.

"The proceedings in general of county courts in probate matters have been treated as judicial, especially when they are adverse, and parties are brought in, or are supposed to be in court; and while some things in the laying out and opening of public roads may be considered as legislative or administrative, still all action affecting the property-rights of private persons is clearly judicial, and subject to review in the appellate courts. (Overbeck *v.* Gallaway, 10 M., 364; Cooper county *v.* Geyer, 19 Mo., 247; Bernard *v.* Callaway County Court, 28 Mo., 37; County of St. Louis *v.* Lind, 42 Mo., 348; Foster *v.* Dunklin, 44 Mo., 216.) This court, in The County of St. Louis *v.* Sparks, 11 Mo., 201, seems to treat the action of the county court against a defaulting collector as judicial, it having been based upon the provisions of Article II of the act concerning county treasurers in the revision of 1835 (p. 151,) a very different statute from the one now in force on the subject, and one that made it

the duty of the county court to render judgment against the defaulter.

"In approving the bond of a sheriff, county courts act in a ministerial, and not in a judicial capacity. (State *ex rel.* Adamson *v.* Lafayette County Court, 41 Mo., 221; State *ex rel.* Jackson *v.* Howard County Court, *id.* 247.)

"County courts have exclusive jurisdiction in the repairing of public building: 'These matters belong to the administrative and ministerial functions of the county court, and not to the judicial branch of their jurisdiction.' (Vitt *v.* Owens, 42 Mo., 512.)

"The action of the county court in making a subscription to the stock of a railroad company is administrative and discretionary. There is no imperative obligation to make it. (St. Joe and Denver City R. R. Co. *v.* Buchanan Co., 39 Mo., 485.)

"We have held, at this term, in Marion county *v.* Phillips, that a settlement with the county collector was not a judicial act, but that of the public agents of the county with one of its officers; and the general question is also considered. The case of St. Joe and Denver City Railroad Company *v.* Buchanan county expressly decides the case at bar; and all the cases are inconsistent with the idea that the exercise of a discretionary power, given by law to the county court of Saline county, if it be given to make a subscription to the stock of a railroad, can be in any sense a judicial proceeding. A court has no discretion, but must render judgment according to the facts and the law, while this subscription might have been made or refused. The judges were bound, it is true, to act with good judgment, judiciously; but exercising a sound judgment is by no means synonymous with rendering judgment, and acting judiciously is not always acting judically.

"In Reppy *vs.* Jefferson County, 47 Mo., 66, plaintiffs' claim was rejected by the county court, and the supreme court says: "Defendants' counsel first contend that the rejection of the claim is a judgment; that the plaintiff is concluded by it, and cannot prosecute in the circuit court. This claim is wholly untenable. The county court, in auditing claims against the county, is but its financial agent, and not a judicial body. It represents the county, and in the numerous prosecutions against it, from the earliest times, it has never been held that a rejected claim was *res adjudicata.*

(Phelps County *vs.* Bishop, 46 Mo., 68.) The idea that a disallowance of a claim operated as a judgment against the claimant has arisen in part from the fact that an appeal is allowed from such action. This, however, is but a statutory mode of bringing the county into circuit court without original process, and the claimant may avail himself of it or commence suit."

In State *vs.* Bollinger County Court, 48 Mo., 475, it was held that *mandamus* would lie against county judges for payment of warrants drawn on swamp land funds, and it is said:

"If this application had been a presentation of a demand against the county, a refusal to allow it could have been appealed from, for such appeal is expressly provided for by statute. (Gen. Stat., 1865, ch. 38, § 36; Wagn. Stat., 415.) The refusal is not a judgment, yet the statute has provided this mode of bringing the county into the circuit court without process, of which a claimant may avail himself if he chooses." (Reppy *vs.* Jefferson, 47 Mo., 66.)

In State to use of Carroll County *vs.* Roberts, 60 Mo. 402, it is said:

"Settlements made with the county court in regard to administrators, guardians, &c., may properly be considered as judicial acts, since they are judgments of a court on proceedings *inter partes* in which there is notice required, and in which the county and the court are not interested. In settlements with collectors, it is a mere accounting between principal and agent or between a supervising agent and the subordinate. I refer to the opinion of Judge Bliss, in 45 Mo., 77, where the learned judge has fully discussed this point and established this disrimination, with the sanction of all the courts."

In International Bank vs. Franklin County, 65 Mo., 105, the court holds a warrant to be evidence of indebtedness—"to all intents and purposes the *promissory note* of the county."

This case *fails* to sustain the proposition "that in the ascertainment of what is due from a county and the fund out

of which it is to be paid, the court is acting judicially," although cited for that purpose in the case.

State, ex rel. Watkins vs. Walker, (Pamphlet, 39.)

In Shelby et al. vs. Guy, 11 Wheat., 361, it is said:

"A fixed and received construction by a State in its own courts makes a part of the statute law."

IV.

THE POSITIONS TAKEN BY PLAINTIFF IN ERROR IN HIS BRIEF ARE UPON PRINCIPLE UNTENABLE AND THE CONCLUSIONS ARE UNSUSTAINED BY AUTHORITY.

It is assumable that some things have been settled in relation to municipal bonds in general and to the bonds issued under this charter in particular.

The bonds are a valid indebtedness of Macon County.

The purchaser is held in law to a knowledge of the statute.

The authorization of a special tax of one twentieth of one per cent was a remedy given *additional* to that otherwise existing. Its grant does not exclude all other remedies. *Boni judicis ampliare justiciam.* The maxim cited by plaintiff in error, *expressio unius est exclusio alterius*, has no application.

An examination of the Pettis Bollinger and Polk County cases cited, will show that they relate entirely to *warrants*, non-negotiable in character, on their face expressed to be payable from special funds mentioned. As such they were accepted by the holders whose rights were limited and controlled by the contract. The vice of plaintiff's argument is the assumption that these bonds were likewise non-negotiable and payable only out of a special trust fund.

The constitution of Missouri cited as limiting county taxation took effect November 30, 1875, and could not affect any of the creditor's rights by impairing his existing remedies. But this the section cited does not purport to do, for it concludes with the following saving clause:

"Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness."

Constitution, sec. 11, art. 10.

The judgment creditor is entitled to payment, and to obtain a warrant on the treasury as a necessary step to that end. Such warrant can be provided for by the county—

1. By the one-half of one per cent. tax.
2. By tax under the general statutes relative to railroads.
3. By tax authorized by implication arising from the existence of indebtedness reduced to judgment.

For statutes, authorities and arguments see brief of plaintiff in No. 98, October Term, 1868.

True, the public buildings are exempt from levy by express enactment, but it does not follow that its general revenue raised annually should not be applied to the payment of judgment indebtedness. The arguments drawn from the inconvenience of paying and the oppressiveness of the burdens are weak and untenable.

In City of Galena *v.* Amy, 5 Wall., 710, it is said:

"The counsel for plaintiff in error has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of the debt. Much as personally we may regret such a state of things, we can give no weight to considerations of this character when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditors, and our duty to enforce them. Such securities occupy the same ground in this Court as all others which are brought before us. When clothed with legal validity it is our purpose to maintain them and to give to their holders the benefit of all

the remedies to which the law entitles them. When invalid we have not hesitated and shall not hesitate to say so. But we cannot recognize a distinction unknown to the law between this and any other class of obligations we may be called upon to enforce."

The inconvenience anticipated to arise from the issue of the general warrant, by reason of the supposed interference with the organization and the maintenance of the local government, constitutes no legal ground for denying the creditor the relief he is entitled to. Any such evil would, at most, be but temporary, and capable of remedy, by the exercise of other existing powers of taxation by the county. In the worst view of the case, the evil, when manifest, would require and doubtless receive appropriate consideration from the legislature.

In Pennsylvania, by a uniform line of decisions, the judgment creditors of municipal corporations have been awarded a preference over other demands

In Pollock *v.* Laurence County (U. S. Circuit Court for the Western Dist. Penn., 7 Pittsburgh Legal Journal, 373) it is said:

"The treasurer is the mere custodian of the public money. The commissioners have the control of it, for none can be lawfully drawn from the treasury without their warrant. To them is confided the high prerogative of taxation, and the failure to exercise it by them or their predecessors is no legitimate answer to an execution. They are required by law to provide for certain municipal objects, to support their convicts, to build bridges, to maintain their courts of justice; but, as the Supreme Court of Pennsylvania says, in Monaghan *v.* Philadelphia, 4 Casey, 210, 'when unfortunately the current expenditures exceed the current income, and all cannot be promptly paid, to the vigilant must be given the first products of the treasury.' And again, 'no statutory regulation or appropriation by the city councils can give a higher sanction to the liquidation of a debt than the judgment of a court of justice, in pursuance of law, that the debt is due and must be paid.'"

In the recent important case, Commonwealth of Pennsylvania *ex rel.* Henry Whelen *v.* The Select and Common Councils of Pittsburg, (November 18, 1878, unreported, see pamphlet,) although there was no *express* statutory power to levy a tax to pay the bonds, the decision was:

"The judgment is reversed, and judgment is now entered for the relator upon the demurrer; and it is further ordered that a writ of peremptory mandamus issue to the Select and Common Councils of the City of Pittsburg, commanding said councils to forthwith make full and ample provisions for the payment of all interest now due on said bonds, and the interest as it shall become due; and further commanding the said councils to assign and appropriate out of the revenue of the said city, derivable from all sources, sufficient moneys for the payment of the interest of the funded debt of said city, so as aforesaid in arrears, and to become due, giving preference, if any deficiency should arise, to the payment of said interest *before the payment of salaries of city officers and the ordinary current expenses of the city.*"

Nothing illegal or within the prohibition of the statute is sought by the defendant in error. The criminal statute cited has no application whatever to the case in hand. Moreover it was passed in 1874, after these bonds were issued, and it cannot affect the contract existing any more than a State constitution or any other State legislation.

The case, State *ex rel.* Wilson *vs.* Garonette, cited by plaintiff in error, was a proceeding in equity by a tax payer, to enjoin the collector from collecting the tax to pay the bonds of Greene county, which were held to be legally authorized in the former case of—

State *ex rel. vs.* Greene County, 54 Mo., 540.

The latter case has been followed by this Court in the cases—

County of Callaway *vs.* Foster, 93 U. S., 567.
County of Scotland *vs.* Thomas, 94 U. S., 682.
County of Schuyler *vs.* Thomas, unreported.

Said latter ruling of the Supreme Court of Missouri this Court, in the Schuyler County case, refused to follow.

The case, Supervisors of Carroll County *vs.* United States, 18 Wall., 77, relating to non-negotiable warrants, was decided on the authority of the settled decisions of Iowa in conformity thereto.

The case, State *ex rel.* Aull *vs.* Shortridge, 56 Mo., 126, has been already passed on, and interpreted by this Court in the case—

United States *vs.* The County of Clark, 96 U. S., 211.

The case, State *ex rel.* Watkins *vs.* Walker, *supra*, was collusive, and was designed to affect the decision of this Court in this case. Hence, it is entitled to no more weight as an authority than the plaintiff's brief, to wit, the weight which its reasoning commands.

This contest is not between the county and the railroad company, but between the county and the holder of its negotiable bonds, for the interest of which he has recovered judgment. Granting the correctness of the statement that fair dealing would have required the company to have refused to accept a subscription in excess of what could have been paid by it, the consequences thereof should not be inflicted on the *bona fide* purchaser of the securities, now a judgment creditor, asking what has been solemnly adjudged to him.

Is not the supreme court a little *facetious* in its volunteered suggestion?

"The time may yet come when the sanguine expectations of the promoters of the project of the development of the county and the increase of its wealth will be realized, and that a tax of $\frac{1}{20}$ of 1 per cent. will raise a fund adequate to the discharge of the obligation."

It is not presumable that the purchaser of these bonds paid less than par for them; and if he did, it in no way affects his rights.

Sac County *vs.* Cromwell, 96 U. S., 211.

Nor is it presumable that the amount of railroad completed affected the price paid for the bonds. True the facts stated in the return are admitted by the demurrer, but only so far as they bear on the case in hand; and this fact had no relevancy or materiality. The bonds are presumably to be issued in advance of the construction of the railroad to aid the same.

Kinnicott *v.* Supervisors, 16 Wall., 452.

In conclusion, defendant in error simply asks this Court to adhere to its former ruling in a similar case, and such adherence must result in an affirmance of this case.

Respectfully submitted,

JOSEPH SHIPPEN,
Attorney for Defendant in Error.